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SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 1504

COWDEN MANUFACTURING COMPANY, - Petitioner,

versus

KORATRON COMPANY, INC. and KORACORP INDUSTRIES, INC., - - Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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SUPREME COURT OF THE UNITED STATES

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No. ———

COWDEN MANUFACTURING COMPANY, - *Petitioner,*

v.

KORATRON COMPANY, INC. and
KORACORP INDUSTRIES, INC., - - *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Cowden Manufacturing Company, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on February 18, 1970.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals for the Sixth Circuit is printed as Appendix A attached hereto. The memorandum and orders of the United States District Court for the Eastern District of Kentucky are printed as Appendix A attached hereto.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on February 18, 1970 and is printed as Appendix A attached hereto. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED.

Is a patent license illegal per se which (a) requires the purchase of unpatented materials, (b) permits the patentee to collect royalties at two levels of trade, and (c) ties the patent and the trademark together to restrain trade and to enlarge the scope and duration of the patent?

When a contract is illegal per se under the antitrust laws of the United States, should a demand for arbitration under the contract be enjoined or should arbitration proceed prior to the trial of the antitrust issues?

May a district court enjoin or stay indefinitely the enforcement of the antitrust laws and of the patent laws of the United States pending determination of a subsequently filed suit to compel arbitration instituted in another district by one of the two antitrust defendants in the original proceeding?

May an appellate court on a limited appeal determine the entire merits of a case?

STATUTES INVOLVED.

Seventh Amendment to the Constitution of the United States, which is printed in Appendix B hereto, *infra,* page 12.

Sherman Antitrust Act, 15 U.S.C. 1-2, which is printed in Appendix B hereto, *infra,* page 12.

The Clayton Act, 15 U.S.C. 14, which is printed in Appendix B hereto, *infra,* page 14.

Antitrust Damages, 15 U.S.C. 15, which is printed in Appendix B hereto, *infra,* page 14.

Federal Arbitration Act, 9 U.S.C. 2, 10, which is printed in Appendix B hereto, *infra,* page 15.

Powers of Appellate Court, 28 U.S.C. 2106, which is printed in Appendix B hereto, *infra,* page 16.

STATEMENT.

The Cowden Manufacturing Company (hereinafter "Cowden") is a manufacturer of work and play clothing. The defendant Koratron Company, Inc. (hereinafter "Koratron"), a subsidiary of the defendant Koracorp Industries, Inc. (hereinafter "Koracorp"), is the owner of invalid process patents for making durable-press clothes.

While Cowden was a licensee of Koratron, Cowden also manufactured durable-press garments from fabrics produced under a system different from and not dependent upon the Koratron method of achieving an identical product; Cowden also questioned the validity of the Koratron patents; and finally Cowden incrimi-

nated Koratron for flouting the antitrust laws (R. 5-32).

Koratron, hoping to evade a judicial determination of the patent and antitrust issues, filed a demand for arbitration (R. 91-92). Cowden countered with this action to enjoin arbitration and to adjudicate first both patent invalidity and the glaring antitrust violations (R. 107). Koratron—seeking to divest the Kentucky District Court of its jurisdiction to try the statutory issues—filed a California petition to compel arbitration (R. 90-92). Momentarily, Koratron prevailed, but the Ninth Circuit vacated the judgment and remanded the case to the California District Court apparently upon the theory that a determination of patent validity or invalidity must precede arbitration (App. C, p.).

Meanwhile, the Kentucky District Court had declined to enjoin arbitration and had also stayed all Kentucky proceedings (R. 104, 144-149).

This appeal is from the orders of the Kentucky District Court, first, overruling a Cowden motion for a temporary injunction (28 USCA 1292), secondly, overruling a Cowden prayer for a declaratory judgment (28 USCA 2201) and, finally, staying indefinitely proceedings upon a Cowden motion for a summary judgment, *Landis* v. *North American Company*, 299 U. S. 248, 81 L. Ed. 153 (1936); *Jewell* v. *Davis*, 192 F. 2d 670 (6 CCA, 1951).

In this record the uncontroverted and uncontrovertible facts establish without any dispute, difference, or disagreement whatsoever that Koratron and Koracorp

violated the antitrust laws of the United States and that the contract between Cowden and Koratron is illegal per se and void. Koratron has (1) required its mill licensees to attach the trademark (with the patent number on it) to all fabrics sold to Cowden and other manufacturer licensees, (2) required its licensed manufacturers of findings (zippers, pockets, etc.) to attach the trademark (with the patent number on it) to all fabrics sold to Cowden and other manufacturer licensees, and (3) directed Cowden and other manufacturers licensed by Koratron to buy fabrics and findings only from Koratron licensees who, in turn, were permitted to sell fabrics and findings with the Koratron trademark only to Koratron licensees (R. 5-32, 66-67).

By tying together its trademark and its patents and by licensing three separate levels of trade, Koratron has unlawfully forced Cowden to purchase unpatented materials as a condition of manufacturing garments under the Koratron patents (R. 5-32). At the same time, Koratron has unlawfully collected royalties twice: First, from the manufacturers of raw materials and, secondly, from the manufacturers of finished garments (R 5-32). The results have been (1) that Cowden and other manufacturer licensees, in addition to paying royalties, have also been forced to pay higher prices than they otherwise would have had to pay for unpatented fabrics and findings; (2) that Cowden and other manufacturer licensees have made less profit than they otherwise would have made on some of their sales and have lost further profits by

failing to make additional sales which, except for the added costs forced upon them by Koratron, could have been closed at lower prices; and (3) that consumers of durable-press garments have been forced to pay substantially higher prices than they otherwise would have had to pay for durable-press garments (R. 114).

Koratron and Koracorp have fashioned their attempt to monopolize trade and commerce out of their system of licensing at two levels of trade and out of their coupling together the patents and the trademark for the purpose of extending the scope and the duration of the patents. The defendants have implemented their contracts and conspiracies in restraint of trade by a myriad of devices many of which are unlawful in and of themselves.

The agreement and license from Koratron to Cowden, and all other licenses to manufacturers, unlawfully provide that each licensee will cease to use processes described in the patents upon termination of the agreement and license and without regard either to the validity of the patents or their expiration dates (R. 33-47).

The same manufacturer agreement and license unlawfully requires each licensee to assign to Koratron the exclusive right (except for a limited, non-assignable shop right) to use any and all improvements in the licensed process whether or not patented as a condition to being licensed under any of the Koratron trademark, patent, and patent applications (R. 33-47).

The same agreement and license unlawfully requires each licensed garment maker to assign to Kora-

tron the exclusive right to any and all improvements in the licensed process acquired by licensee at the request of Koratron as a condition of being licensed under any of the trademark, patent, and patent applications (R. 33-47).

This licensing system has the effect of requiring a substantial portion of an entire industry to suppress evidence known to licensed garment makers concerning defenses to the validity of the Koratron patents, including improvements patents developed by Koratron or assigned to it pursuant to the grant-back clause of each license.

In furtherance of their monopolization and restraint of trade, the defendants have (1) secured publicity threatening non-members of the licensing system with patent infringement actions, (2) charged non-licensees with patent infringement without regard to the validity or invalidity of the patents, and (3) have otherwise attempted to coerce textile mills, manufacturers of trimmings and findings, and garment makers into entering into licenses with Koratron as a condition to engaging in any part of the process of manufacturing durable-press garments (R. 19-26).

By virtue of the licensing system and the coercive practices of the defendants, Cowden was forced to enter into the agreement and license with Koratron with the alternatives being either (1) to risk an action for patent infringement and to have difficulty obtaining properly treated fabrics, trimmings, and findings, or (2) to desist from the manufacture of durable-press garments with consequent injury and damage not only

to Cowden but to consumers of durable-press garments (R. 24-25).

The durable-press market grew from about one hundred million dollars at wholesale in 1964 to about two billion six hundred million dollars in 1968 and Koratron projects that by 1971, the durable-press market will be nine billion dollars (R. 17). From the early part of 1961 until the date of institution of this action, Koratron has collected royalties on not less than 50% of the durable-press market and during a portion of this same period, as much as 90% of the durable-press market (R. 17). If the defendants are not enjoined by this Court from their violations of the antitrust laws, then the defendants will capture more than 90% of the durable-press market in the United States alone (R. 17).

In fact, as we have already observed, Koratron has also resorted to the utilization of both judicial and non-judicial forums to prevent, if possible, a trial by jury of the antitrust issues. Unless this Court reverses the decision of the District Court below, the factual determination of the arbitrators will be final upon all of the issues and Cowden's constitutional right to a trial by jury of the factual antitrust questions will have been totally destroyed.

Affirmation of the District Court orders would give the defendants an advantage to which they are not now entitled to have but which they should enjoy only if, as, and when they have a final adjudication in their favor upon the antitrust issues.

Meanwhile, Cowden and the public will be irreparably harmed. Cowden will (1) continue to pay higher prices for raw materials, to lose sales, and to pay royalties to Koratron and (2) incur the excessive expense of an arbitration hearing in California for which it can never recover a single solitary cent (R. 114-115). Secondly, Koratron will have succeeded in using the Courts of the United States to retain and strengthen its monopoly power to the eternal detriment of the public itself, for how could a consumer ever recover from Koratron the excessive monopolistic prices now being forced upon him by Koratron?

Koratron has failed to show any adverse effect upon its rights by a stay of arbitration except for a delay in beginning the arbitration which is compensable by money interest. But money cannot compensate for Cowden's loss if Cowden ultimately prevails in this Court after arbitration has been concluded: Cowden will have lost its constitutional right to a jury trial. Furthermore, Cowden will have sustained losses of profits which cannot be proven with the exactitude with which a computation can be made for royalties, if any, due Koratron by Cowden's manufacture of other baked goods. Most significantly of all, the public itself will be irreparably harmed if the relief sought by Cowden is not granted.

Finally, the essential facts are worth repeating: The defendants have violated the antitrust laws of the United States. The Koratron licensing agreements, the Koratron "Technical Service Manual" and the letters from Koratoron to Cowden establish without dis-

pute that the Koratron agreement and license with Cowden is illegal per se and void under the antitrust laws of the United States. Koratron itself wrote the uncontrovertible evidence of its own guilt.

GROUNDS FOR CERTIORARI.

1. The Second Circuit Court of Appeals has held that aribtration must be stayed pending the trial of antitrust issues (*Ring* v. *Spina*, 148 F. 2d 647 (1945), cert. denied 335 U. S. 813, 93 L. Ed. 368), but the Sixth and Ninth Circuits have held that arbitration may proceed before the trial of antitrust issues. *A & E Plastic Pak Co.* v. *Monsanto Company*, 396 F. 2d 710 (9 CCA, 1968); *Cowden Manufacturing Company* v. *Koratron Company, Inc., et al.*, Appendix A attached hereto.

2. In *Koratron* v. *Cowden*, the United States District Court for the Northern District of California entered an order compelling arbitration before the trial of the antitrust issues in *Cowden* v. *Koratron*, the Kentucky antitrust case. The Ninth Circuit Court of Appeals reversed citing *Lear, Inc.* v. *Atkins*, 23 L. Ed. 2d 610, 395 U. S. 653 (1969), a patent case which does not have anything whatsoever to do with the issues before the Ninth Circuit. Meanwhile, in *Cowden* v. *Koratron* (the Kentucky antitrust case which was filed before the California arbitration case), the United States District Court for the Eastern District of Kentucky denied a temporary injunction restraining arbitration and stayed all other Kentucky proceedings indefinitely. Upon appeal, the Sixth Circuit remanded

the Kentucky antitrust case "for further consideration in light of the action taken by the Ninth Circuit Court of Appeals," which action was not enlightening, but oracularly obscure, leaving Cowden, Koratron and two district courts completely confused.

3. The legality of a tying agreement between a patent and a trademark is an important federal question which should be settled by this Court.

4. An indefinite stay of an antitrust case is a drastic departure from the accepted and usual course of judicial proceedings.

ARGUMENT.

I. The Koratron License to Cowden Is Illegal and Void.

The Koratron licenses require Cowden to purchase unpatented materials for the manufacture of garments, permit Koratron to collect royalties both from Cowden and from the manufacturers of fabrics and findings, and tie the patent and trademark together to restrain trade and to enlarge the scope and duration of the patent. The Koratron license to Cowden provides that garments manufactured shall "conform as to nature, characteristics and quality to all applicable standards established by LICENSOR . . ." and further provides that Cowden shall "follow the methods, formulae, techniques, and instructions supplied by LICENSOR" (R. 38). The quality standards and the instructions are set forth in Koratron's "Technical Service Manual" and in various letters from Cowden to Koratron. For example, the Manual requires "that KORATRON

approved zippers be used" (R. 154). In a letter to Cowden, Koratron wrote: "We are concerned over the continuing disregard of our policy and requirement to use KORATRON pocketing in KORATRON garments" (R. 150). This Court has held that IBM cannot lease its machines upon the condition that its licensee use its unpatented tabulating cards, that International Salt cannot lease its equipment subject to the requirement that its licensee use its unpatented salt, and that Midas Muffler cannot bar its dealers from purchasing unpatented products from other sources of supply. *IBM* v. *U. S.*, 298 U. S. 131, 80 L. Ed. 1085 (1936); *International Salt Co.* v. *U. S.*, 332 U. S. 392, 92 L. Ed. 20 (1947); *Perma-Life Mufflers, Inc., et al.* v. *International Parts Corp., et al.*, 392 U. S. 134, 20 L. Ed. 2d 982 (1968).

Next, Koratron's licenses permit it to collect a royalty from manufacturers of fabrics, another royalty from manufacturers of findings, and a third royalty from Cowden as a manufacturer of garments, a practice which was condemned in *United States* v. *Univis Lens Co.*, 316 U. S. 241, 86 L. ED. 1408 (1942).

The Koratron licenses to manufacturers of fabrics, findings, and clothes tie the right to the use of the patents to the use of the Koratron trademark, which has the patent number on it. Although this Court has not passed upon a patent-trademark tie-in, an identical license arrangement has been held to constitute "*per se*, a violation of the antitrust laws" *Switzer Brothers, Inc., et al.* v. *Harry P. Locklin, et al.*, 297 F. 2d 39 (7 CCA, 1961).

II. Arbitration Should Be Enjoined.

Because the Koratron license to Cowden is illegal *per se* and void, there is nothing whatsoever to be arbitrated between the parties and, furthermore, there is nothing whatsoever upon which to base an assertion of jurisdiction by the United States District Court for the Northern District of California. If there is no contract, then the California Court plainly cannot compel arbitration under a non-existent agreement. Consequently, for this reason alone, arbitration should be enjoined.

Furthermore, the Federal Arbitration Act, 9 USC 2, provides that an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." As Judge Augustus Hand said in the case of *In re Phalberg Petition,* 131 F. 2d 968 (2 CCA, 1942): ". . . If one party to the alleged contract is contending that it is void *ab initio* (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself also is void." In fact, a compulsory arbitration clause can itself operate to restrain trade and be invalid on its face. *Paramount Famous Lasky Corp.* v. *United States*, 282 U. S. 30, 75 L. Ed. 145 (1930).

In *Ring* v. *Spain, supra,* and in *American Safety Equipment Corp.* v. *J. P. MaGuire & Co.,* 391 F. 2d 821 (2 CCA, 1968), the Second Circuit has twice concluded that the trial of antitrust issues should precede

arbitration. In the *Ring* case, the Court found the agreement to be illegal *per se* under the Sherman Act and concluded that: "No good purpose will be served by forcing the parties to the time and expense of arbitration while this question remains unsettled; and serious legal problems may develop if an arbitration is had, and thereafter the contracts are held invalid." In the *American Safety Equipment Corp.* case, the Court observed: "A claim under the antitrust laws is not merely a private matter . . . in addition, the issues in antitrust cases are prone to be complicated and the evidence extensive and diverse, far better suited to judicial than to arbitration procedures. Moreover, it is the business community generally that is regulated by the antitrust laws. Since commercial arbitrators are frequently men drawn for their business expertise, it hardly seems proper for them to determine these issues of great public interest . . . We conclude only that the pervasive public interest in enforcement of the antitrust laws, and the nature of the claims that arise in such cases, combine to make the outcome here clear . . . ."

In *A. & E. Plastik Pak Company, Inc.* v. *Monsanto Company, supra,* which was cited by the Sixth Circuit Court of Appeals, a suit had been filed claiming that the contract between the parties was in violation of the Sherman Act and that, consequently, arbitration should be enjoined.

The District Court denied the temporary injunction and on appeal the Ninth Circuit said that this did not constitute an abuse of discretion. Nevertheless, the

order denying the temporary injunction was set aside for a reconsideration of the entire matter and the Court said:

> "In Wyatt Earp Enterprises v. Sackman, Inc., 157 F. Supp. 621 (S.D.N.Y. 1958), the court, in rejecting a stay, found a strong case for invalidity and noted that proceeding to arbitration would merely add to the costliness and delays of litigation that arbitration is supposed to eliminate.
>
> "Invalidity is not so clear here. The court understandably could wish to know the precise dimensions of the parties' agreement before undertaking to decide its validity.
>
> "We do by our decision, however, drastically limit the area open to arbitration and this may well affect the decision of the District Court as to the order and the forum in which factual determination should be made. The order denying temporary injunction must in any event be set aside for lack of necessary limitation. Reconsideration of the entire matter, *sua sponte* or upon application by either party, should now be available.
>
> "Reversed and remanded with instructions that the order denying temporary injunction be set aside and for further proceedings."

In the *A. & E. Plastic Pak* case, the Court said that contract validity "is not so clear" but here in *Cowden* v. *Koratron,* there can be no question about the fact of invalidity; the contract is illegal *per se* on its face and is as clearly invalid as the contracts before the Court in *Ring* v. *Spina, supra,* and *American Safety Equipment Corporation* v. *J. P. MaGuire, supra.* As the

Court concluded in the *Ring* case, arbitration must be enjoined to permit the trial first of the plaintiff's antitrust claim. This Court, in *Beacon* v. *Westover,* 359 U. S. 500, 3 L. Ed. 2d 988 (1959), approved this procedure in order to protect the plaintiff's right to a jury trial. The editor of a timely annotation concludes: "In the interests of the general public welfare the courts will not enforce agreements to submit to arbitration disputes arising under the federal antitrust laws." 3 ALR Fed. 918. And the cogent logic of a law journal comment supports the conclusion that arbitration must be enjoined pending the trial of antitrust claims. Farber, *The Antitrust Claimant and Compulsory Arbitration Clauses,* 28 Federal Bar Journal 90 (Winter, 1968).

III. A District Court Cannot Enjoin or Stay the Enforcement of the Antitrust Laws of the United States Pending Determination of a Subsequent Suit to Compel Arbitration Instituted in Another District Court by One of the Two Antitrust Defendants.

Never before has any court stayed decision of a submitted motion for a summary judgment upon an antitrust claim pending the outcome of an action to compel arbitration later filed in another court. Although undoubtedly unforeseen by the trial court, the result is outlandish. Cowden is restained from prosecuting an antitrust claim against Koracorp and Koratron while Koratron alone seeks in a subsequent suit in another court to compel Cowden to submit to arbitration.

Enforcement of the antitrust laws is thwarted by a mere demand for arbitration.

How, conceivably, can Cowden be deprived of its right to recover a judgment against Koracorp by a subsidiary of Koracorp instituting an action against Cowden to compel arbitration in another jurisdiction? If that is the law, then a boiler-plate arbitration clause can be used effectively to enjoin enforcement of the antitrust and patent laws of the United States. Of course, not a single authority can be found to support the proposition that an arbitration provision can be used by one corporation to suspend the enforcement of the antitrust laws of the United States against both it and still another corporation.

The Kentucky District Court stayed the Cowden's motion for a summary judgment indefinitely. In *Landis* v. *North American Company, supra.*, this Court, in reversing the District Court's stay of its own proceedings until after the decision of another Court, said:

> "We are satisfied that the limits of a fair discretion are exceeded in so far as the stay is to continue in effect after the decision by the District Court in the suit against the Bond and Share Company, and until the determination by this court of any appeal therefrom . . .
>
> "We fix the uttermost limit as the date of the first decision in the suit selected as a test, laying to one side the question whether it should even go so far."

In *Mach-Tronics, Inc.* v. *Zirpoli,* 316 F. 2d 820 (9 CCA, 1963), the Court held that a federal treble dam-

age action cannot be stayed pending the outcome of another case. The impeccable reasoning of Mr. Justice Pope is applicable here: Whether a District Court dismisses a suit or grants a stay, the effect upon a litigant entitled to be heard is exactly the same and just as disastrous to his rights.

IV. Injunction and Summary Judgment Are the Appropriate Remedies Here.

The rationale of the authorities cited on pages 11 through 16 of this petition is that whenever there is a *prima facie* case of an antitrust violation, then arbitration should be stayed. The Government was granted injunctive relief in *IBM* v. *U. S., supra.*, and the same remedy has been held available to private individuals and corporations. *Ring* v. *Spina, supra.* Where the acts of the defendants are illegal, as here, it is not necessary to weigh the injuries or to balance the equities. *Youngstown Sheet & Tube Co.* v. *Sawyer,* 103 F. Supp. 569 (D. DC, 1952) aff'd 343 U. S. 579, 96 L. Ed. 1153 (1952). Where the District Court has improvidently exercised its discretion by denying an injunction, then denial of the injunction will be modified or reversed. *Ring* v. *Spina, supra.* Summary judgment has also been held to be the most appropriate remedy in antitrust cases and, especially so, where the violation is apparent from reading contracts as construed by the guilty party. *International Salt Co.* v. *U. S., supra.* A grant of injunctive relief upon the plaintiff's motion for a summary judgment is the most appropriate remedy here.

V. An Appellate Court on a Limited Appeal May Determine the Entire Merits of the Case.

Ordinarily, when an appeal is taken from the denial of a preliminary injunction, the reviewing court will go no further into the merits than is necessary to decide the interlocutory appeal. However, this rule is subject to a general exception—the appellate court may dismiss the complaint if examination of the record reveals that the case is entirely void of merit and, for the very same reason, the appellate court may direct a verdict or a summary judgment for a plaintiff in an appropriate case. This exception serves the obvious interest of economy of litigation. That was the holding of the second circuit in *Hurwitz, et al.* v. *Directors Guild of America,* 364 F. 2d 67 (2 CCA, 1966) and certiorari was denied 385 U. S. 971, 17 L. Ed. 2d 435 (1966). More recently, in *Jorge* v. *Standard Cigar Company,* 392 F. 2d 706 (5 CCA, 1968), the District Court entered a summary judgment dismissing the Complaint, but, on appeal, the circuit court reversed and directed the entry of a summary judgment for the plaintiff. The holding is in the spirit of *Neely* v. *Eby Construction Company,* 386 U. S. 317, 18 L. Ed. 2d 75 (1967), in which the trial judge had denied the defendant's motion for a directed verdict and also a later motion for a judgment notwithstanding the verdict.

This Court, however, reversed the District Court's judgment for the plaintiff with instructions to dismiss the action. This Court cited 28 USC 2106 which provides that:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside, or reverse any judgment, decree, or order of a court lawfully brought before it for review and may remand the cause and direct the entry of such appropriate judgment, decree, or order or require such further proceedings to be had as may be just under the circumstances."

The genesis of this rule is fully set forth in *Smith* v. *Vulcan Iron Works,* 165 U. S. 518, 41 L. Ed. 810 (1897) which held that upon an appeal from an interlocutory decree granting a temporary injunction in a patent case, the circuit court of appeals can render or direct a final decree on the merits.

That is what this Court did and that is exactly what Cowden is asking this Court to do again: To render a final decree on the merits. This case was submitted to the District Court upon all pending motions including the Cowden motion for a summary judgment and the Cowden motion for an injunction. This, therefore, is not a case like *Switzerland Cheese Association* v. *E. Horne's Market,* 385 U. S. 23, 17 L. Ed. 2d 23 (1966), where there were unresolved issues of fact. Koratron has had every opportunity to controvert the allegations of the verified complaint and of the affidavits. All—not some—all of the relevant facts are in the record and this Court has the power now to dispose of the entire case on the merits.

After all, the very object of a motion for a summary judgment is to separate what is formal or pretended from what is genuine and substantial, and

thereupon to determine whether or not a trial is necessary. This is a case crying out for the application of Civil Rule 56-E which provides:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

There is not a single solitary fact in this record to contradict the Cowden proof that Koratron and Koracorp have forced Cowden to purchase unpatented raw materials in contravention of the most emphatic decisions of the Supreme Court banning that exact unlawful practice and here we rely especially upon the 1968 and 1969 decisions of the Supreme Court: *Fortner Enterprises* v. *United States Steel,* 394 U. S. 495, 22 L. Ed. 2d 495 (1969) and *Perma Life Mufflers* v. *International Parts Corp., et al., supra.*

Furthermore, Koratron and Koracorp have also unlawfully collected royalties from three separate levels of trade: from manufacturers of fabrics, manufacturers of findings, and manufacturers of clothes, a practice which was condemned in *United States* v. *Univis Lens Co., supra.*

The royalty contracts, when read together, and, again, each royalty contract, when taken separately, but as construed by Koratron is void on its face.

Therefore, no basis whatsoever exists for an exercise of jurisdiction on a non-existent contract by the United States District Court for the Northern District of California.

In *American Safety Equipment Corp.* v. *J. P. MaGuire & Co., supra.*, and in *Ring* v. *Spina, supra.*, the courts concluded that arbitration must be enjoined to prevent irreparable injuries from antitrust violations and in *Jorge* v. *Standard Cigar Company, supra.*, and other cases, it has been held that upon a comparable factual showing a summary judgment should be entered in favor of the claimant.

In its motion for a summary judgment, Cowden asks for a declaratory adjudication that Koratron and Koracorp have violated the antitrust laws of the United States, that the agreement and license is illegal and void, and that Koratron and Koracorp are indebted to Cowden for liquidated damages. Cowden also asks for an injunction enjoining Koratron from proceeding with its action in the United States District Court for the Northern District of California to compel arbitration. On the merits, Cowden is entitled now to a summary judgment and to the injunctive relief which it seeks.

Kentucky is the place where Koratron and Koracorp committed their antitrust crimes and this Court is the place for Cowden to recover now for the irreparable injuries that it has suffered.

CONCLUSION.

The decisions of the Courts of Appeal are in conflict upon the question of which comes first: the trial of antitrust issues or arbitration. The legality or illegality of a tie-in agreement involving a patent and a trademark presents an important question of federal antitrust law which has not been settled by this Court. The decisions below are in direct conflict with the applicable decisions of this Court which prohibit the practice of requiring a patent licensee to purchase unpatented materials and supplies. The indefinite stay of proceedings in the District Court is a total departure from the accepted and usual course of judicial proceedings. Therefore, it is submitted that this Court should note jurisdiction and require briefs on the merits of the case and oral argument for resolution of the substantial questions presented.

Respectfully submitted,

JACK CORINBLIT,
Suite 575,
3700 Wilshire Boulevard,
Los Angeles, California,
Attorney for Petitioner.

Of Counsel:

CORINBLIT AND SHAPERO,
Suite 575,
3700 Wilshire Boulevard,
Los Angeles, California,

CLAY AND MARYE,
50 Broadway,
Mt. Sterling, Kentucky.

PROOF OF SERVICE.

I, Jack Corinblit, one of the attorneys for Cowden Manufacturing Company, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of April, 1970, I served a copy of the foregoing Petition for Writ of Certiorari and of the Appendix thereto on the Respondents thereto, as follows:

On Koratron Company, Inc. and Koracorp Industries, Inc. by mailing a copy in a duly addressed envelope, with postage prepaid, to Brobeck, Phleger & Harrison, 111 Sutter Street, San Francisco, California 94104 and by mailing a copy in a duly addressed envelope, with Airmail postage prepaid, to Middleton, Seelbach, Wolford, Willis & Cochran, 501 South Second Street, Louisville, Kentucky 40202 Attorneys for Koratron Company, Inc. and Koracorp Industries, Inc.

JACK CORINBLIT,
Suite 575,
3700 Wilshire Boulevard,
Los Angeles, California,

Attorney for Petitioner.

Office-Supreme Court, U.S.
FILED
APR 29 1970
JOHN F. DAVIS, CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 1504

COWDEN MANUFACTURING COMPANY, - Petitioner,

versus

KORATRON COMPANY, INC. and KORACORP INDUSTRIES, INC., - - Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

APPENDIX.

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WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

APPENDIX A

OPINIONS BELOW

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 19,403

COWDEN MANUFACTURING COMPANY, - *Plaintiff-Appellant,*

v.

KORATRON COMPANY, INC. and
KORACORP INDUSTRIES, INC., - *Defendants-Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY,
AT LEXINGTON.

OPINION—Decided and Filed February 18, 1970.

Before: PECK and COMBS, Circuit Judges, and MCALLISTER, Senior Judge.

PECK, Circuit Judge. This is an action brought by Cowden Manufacturing Company (hereinafter "Cowden") for damages for alleged violations of the federal antitrust, patent and trademark laws. Cowden is a garment manufacturer and a licensee under a patent for permanent press garments owned by Koratron Company* (hereinafter "Koratron").

*Koracorp Industries, Inc. is a California corporation and owner of the stock of Koratron. It is not independently involved in any of the questions here at issue.

A dispute arose in 1967 over the payment of royalties under the parties' license agreement. Koratron filed a demand for arbitration pursuant to the clause in the agreement that provided for resolution of such disputes by arbitration in San Francisco, California, by the American Arbitration Association. Cowden then brought the present suit in the District Court in Kentucky. Koratron thereafter filed a petition in the District Court in California seeking an order to compel arbitration. Cowden sought a temporary injunction in the District Court in Kentucky to enjoin this action in California.

The District Court in Kentucky denied this relief and also Cowden's request for a declaratory judgment. After this, the District Court in California compelled arbitration and Cowden appealed to the United States Court of Appeals for the Ninth Circuit. While the appeal was pending, Cowden moved for a summary judgment in the District Court in Kentucky and Koratron moved to dismiss because of a lack of personal jurisdiction, for improper venue, or for insufficiency of service of process; to transfer the case to California; and to stay the proceedings pending disposition of the proceedings in California.

The District Court in Kentucky ordered the proceedings in its court stayed, pending the decision of the Ninth Circuit and declined to rule on the remaining motions that were pending. Cowden appealed from the denial of the temporary injunction and the declaratory judgment by the Kentucky District Court and also from that Court's order staying the proceedings. After the appeal was filed in our Court, the Ninth Circuit vacated the order of the California District Court that compelled arbitration and ordered a reconsideration in light of a recent Supreme Court case, *Lear, Inc.* v. *Adkins,* 395 U. S. 653 (1969).

The question presented is whether the District Judge erred in denying the temporary injunction and in staying the proceedings. The scope of review in such an appeal is

whether the denial of the injunction was within the sound judicial discretion of the trial judge, and the decision will not be disturbed unless contrary to some rule of equity or the result of an improvident exercise of judicial discretion. *American Federation of Musicians* v. *Stein*, 213 F. 2d 679, 683 (6th Cir.), *cert. denied*, 348 U. S. 873 (1954); *Nashville I-40 Steering Committee* v. *Ellington*, 387 F. 2d 179, 182 (6th Cir. 1967), *cert. denied*. 390 U. S. 921 (1968).

We conclude that the District Court did not abuse its discretion nor commit any error in denying the temporary injunction and in staying the proceedings. The District Court stated that the question of the applicability of the arbitration clause to the matters presented had to be determined, and since that question was already at issue in the District Court in California, it declined to enjoin that action. In a case similar to the present action, *A & E Plastic Pak Company, Inc.* v. *Monsanto Company*, 396 F. 2d 710 (9th Cir. 1968), the Ninth Circuit outlined the issues that should be arbitrated and relying on *American Safety Equipment Corporation* v. *J. P. Maguire & Company*, 391 F. 2d 821 (2d Cir. 1968), it excluded the antitrust issue from arbitration. The Court in *Monsanto* then held that the District Judge did not abuse his discretion in ordering arbitration to proceed before the determination of the antitrust issue, even though it set aside the denial of the temporary injunction for lack of "necessary limitation" of the arbitrable issues by the District Judge.

A different situation is involved here since there are two District Courts involved and one, in California, has exclusive jurisdiction over the arbitration issue, which is presently before it, because such was provided for by the parties in their license agreement. Under the circumstances of this case, we cannot say that the action of the District Court in Kentucky in denying the temporary injunction constituted an abuse of discretion.

After the District Court in California compelled arbitration, the District Court in Kentucky declined to reconsider the matter, but stayed the proceedings there pending the appeal of the decision of the California District Court to the United States Court of Appeals for the Ninth Circuit. In view of the action taken by the Ninth Circuit in vacating the order that compelled arbitration and since the District Court in Kentucky has not had an opportunity to review this subsequent action, we remand for further consideration in light of the action taken by the Ninth Circuit Court of Appeals.

The case is affirmed and remanded to the District Court for further proceedings consistent herewith.

JUDGMENT—Filed February 18, 1970.

APPEAL from the United States District Court for the Eastern District of Kentucky.

BEFORE: PECK and COMBS, Circuit Judges and McALLISTER, Senior Circuit Judge.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed and the case remanded to the District Court for further proceedings consistent with the opinion.

Each party to pay its own costs on appeal.

Entered by order of the Court.

(s) CARL W. REUSS,
Clerk.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
LEXINGTON

Civil No. 1856

COWDEN MANUFACTURING COMPANY, - - *Plaintiff*,

v.

KORATRON COMPANY, INC., - - - - *Defendant*.

ORDER—Filed July 3, 1968.

On June 28, 1968, came the plaintiff by William C. Clay, Jr., its attorney, and for the defendant appeared Eugene B. Cochran, David W. Lennihan and Richard Wydick, its attorneys.

Mr. Lennihan for the defendant stated to the Court that he was not entering the appearance of the defendant except for the sole purpose of raising the questions of insufficient process, no venue and no jurisdiction. He requested the right to have his oral motions entered of record and stated that he would file written motions later and with the permission of the Court so to do he was ready to proceed to consider the questions raised in the plaintiff's complaint.

Counsel for the defendant orally moved the Court to dismiss the complaint and stated a written motion would be promptly filed. The Affidavits of E. Thomas Cox, W. L. Cowden and William B. Cowden were filed on behalf of the plaintiff by its attorney who then made an opening statement of the case.

The Affidavit of Arthur F. Cunningham, and a Memorandum in opposition to the plaintiff's motion for a temporary injunction was filed by the defendant's counsel.

Mr. Lennihan then made an opening statement for the defendant.

The Court heard counsel on the motions of the plaintiff for a Temporary Injunction and for a Declaratory Judgment and, being advised, overruled the motions and each of them.

It was Ordered that this case be and it is continued.

(s) Mac Swinford,
Judge.

July 3, 1968.

ORDER—Filed November 5, 1968.

On October 28, 1968, came the plaintiff by William C. Clay, Jr., its attorney, and for the defendants appeared Eugene B. Cochran, David W. Lennihan and Richard Wydick, their attorneys.

The Affidavit of E. Thomas Cox in opposition to the motion by the defendants to stay these proceedings or to transfer these proceedings to the United States District Court for the Northern District of California was filed by the plaintiff's counsel.

The Affidavits of Louis Hochstaedter and David W. Lennihan and a memorandum in response to the brief for the plaintiff were filed by counsel for the defendants.

After hearing preliminary argument by counsel and the Court being advised it was ordered that upon the pending motions this action be and it is hereby submitted to the Court for its further orders, provided, however, that counsel for the plaintiff or counsel for the defendants are granted leave to file a motion for an oral argument upon any of the pending issues.

It was further ordered that this case be and it is continued.

(s) MAC SWINFORD,
Judge.

November 5, 1968.

No Objection:

(s) Eugene B. Cochran,
Attorney for Defendants.

(s) William C. Clay, Jr.,
Attorney for Plaintiff.

Copies to:

Clay & Marye,
Middleton, Seelbach, Wolford, Willis & Cochran,
Brobeck, Phleger & Harrison.

MEMORANDUM AND ORDER—Filed December 4, 1968.

This action was brought by Cowden Manufacturing Co. against Koratron Co., which licensed a patented process to Cowden, and against Koracorp Industries, the sole stockholder of Koratron. Numerous issues are raised under the antitrust laws, patent laws, and in other areas of the law.

Asserting that Cowden had failed to pay royalty due under the license, Koratron filed a demand for arbitration with the American Arbitration Association in San Francisco on May 24, 1968. This action was commenced on June 13. On June 21, Koratron petitioned the U. S. District Court for the Northern District of California for an order compelling Cowden to arbitrate, and on July 30 that court ordered the parties to proceed with arbitration. That order has been appealed to the Ninth Circuit Court of Appeals, which has ordered the appeal to proceed on an expedited schedule.

The defendants have moved to dismiss for lack of personal jurisdiction, for improper venue, or for insufficiency of service of process, have moved for an order transferring

this case to the Northern District of California, and have moved that this action be stayed pending disposition of the proceedings in California. The defendants have also objected to certain interrogatories propounded by plaintiff. Plaintiff has moved for summary judgment.

Defendants' motion for an order staying proceedings in this action should be sustained, and this action should be stayed pending decision by the Ninth Circuit Court of Appeals on the appeal from the order compelling arbitration. In enacting the Arbitration Act, the clear congressional purpose was that "the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U. S. 395, 404. Until the question of arbitration is settled by the Ninth Circuit, any proceedings in this action would tend to hinder the arbitration process.

Plaintiff contends that the case of Landis v. North American Co., 299 U. S. 248, prevents this court from staying this action after the judgment of the district court in California. In *Landis* the district court in the District of Columbia stayed an action before it pending final determination of an action in a district court in New York. The court was reversed by the Supreme Court. But *Landis* is distinguishable from the instant case in several respects. First the New York action involved different parties than the District of Columbia action, so the plaintiff in the District had to await the outcome of litigation to which he was a stranger. In the instant case, plaintiff is a party to the action in California. Second, *Landis* did not involve the question of arbitration. Third, the court in *Landis* pointed out that more than a year had passed since the stay order and that much more time might be consumed before the New York action was disposed of. In the instant case, however, the appeal from the order in California is

proceeding on an expedited schedule. Cowden has already filed its appellate brief and that of Koratron was due early in November. Undoubtedly, the Court of Appeals will soon render a decision.

At this time, I decline to rule on the motions to dismiss and to transfer, the motion for summary judgment, and the objections to interrogatories.

The motion of the defendants for an order staying proceedings herein is sustained, and it is ordered that all proceedings herein are stayed until further orders of this court.

(s) MAC SWINFORD,
Judge.

December 4, 1968.

Copies to:

Clay & Marye,
Middleton, Seelbach, Wolford, Willis & Cochran,
Brobeck, Phleger & Harrison.

FINDINGS OF FACT—Filed January 6, 1969.

1. The Agreement and License between defendant, Koratron Company, Inc., and plaintiff, Cowden Manufacturing Company, contains an arbitration clause which provides in part as follows:

> "Any controversies or claims arising out of or in connection with this agreement, or the breach thereof, except the issue of patent infringement, shall be determined by arbitration in San Francisco, California, or such other place as the parties hereto agree upon, in accordance with the Rules then obtaining of the American Arbitration Association, and shall be determined by such Association.
>
> "Such determination shall be final and conclusive and binding upon the parties hereto, their assigns and successors."

2. Koratron filed a demand for arbitration of a dispute between Koratron and Cowden with the American Arbitration Association in San Francisco on May 24, 1968.

3. Cowden filed this action on June 13, 1968, in which it sought, inter alia, a temporary injunction restraining Koratron from proceeding with arbitration and moved for such a temporary injunction.

4. Koratron filed a petition for an order compelling arbitration in the United States District Court for the Northern District of California on June 21, 1968.

5. On June 28, 1968, a hearing was had in this court on Cowden's motion for a temporary injunction.

6. On July 30, 1968, the United States District Court for the Northern District of California entered an order compelling Koratron and Cowden to proceed with arbitration of the controversy between them.

7. Cowden filed a Notice of Appeal from the said order of the United States District Court for the Northern District of California on August 14, 1968.

CONCLUSIONS OF LAW.

1. Cowden has an adequate remedy at law, namely, the interposing of its defenses in the action commenced in the United States District Court for the Northern District of California. 28 Am. Jur. Injunctions, section 204; Porto Rico Tel. Co. v. Puerto Rico Communications Authority, I Cir., 189 F. 2d 39, cert. denied 342 U. S. 830.

2. Because the United States District Court for the Northern District of California is the only federal court which can compel arbitration in San Francisco, as provided in the contract between the parties, it is a more appropriate forum for determining issues of arbitrability. 9 U.S.C. 4. Consequently, even though this action was commenced prior to the action in California, equitable considerations dictate

that such issues should be determined by the court in California. Small v. Wageman, 1 Cir., 291 F. 2d 734, 736.

3. A judge of a coordinate jurisdiction having ordered arbitration to proceed, this court should not now reconsider such matters. Van Laeken v. Wixon, N.D. Cal. 84 F. Supp. 958, 963.

4. Cowden is not entitled to a temporary injunction restraining Koratron from proceeding with arbitration.

(s) MAC SWINFORD,
Judge.

January 6, 1969.

Copies to:

Clay & Marye,
Middleton, Seelbach, Wolford,
Brobeck, Phleger & Harrison.

ORDER—Filed January 6, 1969.

The plaintiff's motion to alter or amend this court's order entered on December 4, 1968, is sustained in part and overruled in part.

The plaintiff's motion that this court certify that its orders involve a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation is overruled.

The plaintiff's motion to let the order of December 4, 1968, reflect the judgment of the court upon plaintiff's motion, filed on July 10, 1968, for a new trial and to alter or amend this court's order of July 3, 1968, is sustained.

It is ordered that this court's order filed herein on December 4, 1968, is amended as follows: In addition to all of the orders contained therein, it is ordered that the plaintiff's motion, filed on July 10, 1968, for a new trial and

to alter or amend this court's order of July 3, 1968, is overruled.

(s) MAC SWINFORD,
Judge.

January 6, 1969.

Copies to:
Clay & Marye,
Middleton, Seelbach, Wolford,
Brobeck, Phleger & Harrison.

APPENDIX B

TEXT OF STATUTES

Constitution of the United States
Amendment 7

Trial by Jury in civil cases.—In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

15 USC 1-2

Sherman Antitrust Act

Section 1. *Trusts in restraint of trade—Minimum price contracts—Penalty.*—Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: Provided, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the

resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914: Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

2. *Monopolizing trade a misdemeanor—Penalty.*— Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction

thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

15 USC 14

The Clayton Act

14. *Sale, lease, or contract on agreement not to use goods of competitor.*—It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

15 USC 15

Antitrust Damages

15. *Suits by persons injured—Recovery of triple damages.*—Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in

controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

9 USC 2, 10

Federal Arbitration Act

2. *Validity, irrevocability, and enforcement of agreements to arbitrate.*—A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

10. *Vacation—Grounds—Rehearing.*—In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final,

and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

28 USC 2106

Powers of Appellate Court

2106. *Determination.*—The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

APPENDIX C

NINTH CIRCUIT OPINION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 23,287

KORATRON MANUFACTURING COMPANY, *Petitioner-Appellee,*

v.

COWDEN MANUFACTURING COMPANY, *Respondent-Appellant.*

[October 31, 1969]

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA.

Before: JERTBERG, BROWNING and DUNIWAY, Circuit Judges.

PER CURIAM:

The judgment appealed from is vacated and the cause is remanded to the District Court for further consideration in the light of the decision of the Supreme Court of the United States in *Lear, Inc.* v. *Adkins*, 1969, 395 U. S. 653.

MAY 25 1970
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1504

COWDEN MANUFACTURING COMPANY,
Petitioner,

vs.

KORATRON COMPANY, INC., and
KORACORP INDUSTRIES, INC.,
Respondents.

Brief for Respondents in Opposition to Petition for Writ of Certiorari

MOSES LASKY
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111 Sutter Street
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Attorney for Respondents.

Of Counsel:
RICHARD C. WYDICK
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BORG PRINTING COMPANY OF CALIFORNIA, 546 FIRST STREET, SAN FRANCISCO 94105

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1504

COWDEN MANUFACTURING COMPANY,
Petitioner,

vs.

KORATRON COMPANY, INC., and
KORACORP INDUSTRIES, INC.,
Respondents.

Brief for Respondents in Opposition to Petition for Writ of Certiorari

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is not yet reported. Both it and the memorandum of the District Court appear in Appendix A to the petition.*

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). Inasmuch as there was no final order of the District Court, the Court of Appeals had jurisdiction only of an appeal from an in-

*That appendix will be referred to as "App." The record in the Court of Appeals contained an appendix to the briefs, which will be referred to as "C.A.App."

terlocutory order denying a preliminary injunction, under 28 U.S.C. § 1292(a)(1). It had no jurisdiction of other matters sought to be touched on in the petition.

QUESTIONS PRESENTED

The petition pretends to present four questions. But none is before this Court. Petitioner, plaintiff below, admits (Pet. p. 20) that it "is asking this Court . . . to render a final decree on the merits." The request is bold and novel, for there has been no trial, no evidentiary hearing in the District Court. Indeed, issue has not even been joined there. No answer to the complaint has been filed. The case is pending in the District Court on a motion by defendant (respondent) to dismiss for lack of jurisdiction or venue or to transfer under 28 U.S.C. § 1404(a).

The only question conceivably before the court below, the only question on which it passed, and the only one which could possibly be tendered to this Court is this triviality:

> Did the District Court for the Eastern District of Kentucky abuse its discretion in denying petitioner's application for a preliminary injunction against proceedings by respondent in the District Court for the Northern District of California to compel arbitration of disputes under a patent license agreement?

STATEMENT OF THE CASE

Some connection between the facts and the statement of the case in the petition is discernible.

Respondent Koratron Company, Inc. ("Koratron"), a California corporation, owns the patents on a process of making "permanent press" garments (R. 97).* Petitioner ("Cowden") is a

*As the opinion below states (App. A, p. 1, fn.), the other respondent, "Koracorp Industries Inc., is a California corporation and the owner of the stock of Koratron. It is not independently involved in any of the questions here at issue." It was mentioned for the first time in Cowden's second amended complaint, apparently for the purpose of furnishing Cowden a co-conspirator for Cowden's claims under § 1 of the Sherman Act. (C.A. App. p. 2, item 22)

garment maker. It obtained a license from Koratron to use the patented process, for which it agreed to pay royalties to Koratron (R. 33-45). Koratron audited Cowden's books and concluded that Cowden had failed to pay more than $134,000 in royalties, due under Koratron's interpretation of the license (R. 65).

Because the license agreement provides for resolution of disputes by arbitration in San Francisco rather than suit (R. 44), Koratron filed a demand for arbitration with the American Arbitration Association in San Francisco (R. 63-66). Cowden's response was to rush into the District Court for the Eastern District of Kentucky with this suit, in which it alleged a variety of contract, patent, antitrust and trademark claims, and it applied herein for a preliminary injunction to prevent Koratron from proceeding with arbitration (R. 88). This being Cowden's first manifestation of refusal to arbitrate as provided by the contract, Koratron filed a petition under the federal Arbitration Act (9 U.S.C. § 1, et seq.) in the District Court for the Northern District of California, the only federal court with jurisdiction to hear such a petition, but abstained from pursuing it until Cowden's application in the present case for a preliminary injunction was denied by the District Court in Kentucky (App. 5, 6). Thereafter the District Court in California granted Koratron's petition to compel arbitration, and Cowden appealed that order to the Court of Appeals for the Ninth Circuit. After argument and submission of that appeal, this Court decided *Lear, Inc. v. Adkins*, 395 U.S. 653 (1969), and the Ninth Circuit vacated the arbitration order and remanded it to the California District Court for reconsideration in the light of the *Lear* decision (App. 2).

Meanwhile, Cowden moved for summary judgment in this case in the District Court in Kentucky (R. 118-121).* Previously Kora-

*The petition seems to refer to a motion by Cowden in the District Court for a "declaratory judgment" as if it were something different from its motion for a summary judgment. But a motion for judgment on a complaint, before issue is joined or the case is tried, is a motion for summary judgment.

tron had moved to dismiss this case for lack of personal jurisdiction and venue, to transfer it to California under 28 U.S.C. § 1404(a) or § 1406, or to stay it pending the outcome of proceedings in California (App. 2). The District Court entered an order postponing these several motions of Koratron and Cowden and staying proceedings until a decision by the Ninth Circuit on Cowden's appeal there* (App. 7-9), but before the Ninth Circuit ruled Cowden appealed to the Sixth Circuit from the interlocutory orders in this case denying its request for a preliminary injunction, postponing decision on its motion for summary judgment and temporarily staying proceedings.

The Sixth Circuit affirmed. It is to that judgment Cowden directs the instant petition.

DISCUSSION

There is no conceivable basis for seeking the writ. No conflict is involved, no questions of substance have yet been decided, no novel rule of law announced.

Portions of the petition seem to ask this Court to review the decisions of the Ninth Circuit and the District Court in California as to arbitrability of various issues and as to whether arbitration should precede or follow judicial resolution of non-arbitrable issues (See Pet. pp. 8-16). It would seem obvious that the decisions of those courts are not reviewable by a writ to the Sixth Circuit. There can be no arbitration unless and until the courts in the Ninth Circuit so direct. All that is involved is an appeal from denial of a preliminary injunction to restrain arbitration and from postponement of decision on a motion for summary judgment in favor of plaintiff on its complaint.

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*The petition erroneously states (pp. 10, 11, 17) that the stay was "indefinite," but the order of the District Court is quite plain and leaves no room for that assertion (App. 8).

There is no basis for reviewing the denial of a preliminary injunction

On review of a grant or denial of a preliminary injunction, the test is whether the lower court abused its discretion. *Nashville I-40 Steering Comm. v. Ellington,* 387 F.2d 179, 182 (6th Cir. 1967), *cert. denied,* 390 U.S. 921 (1968). Basic to any application for an injunction is lack of an adequate remedy otherwise. Koratron could not force Cowden to arbitrate in San Francisco except by bringing appropriate proceedings to compel arbitration, and the federal court with jurisdiction of such proceedings is the court in San Francisco (9 U.S.C. § 4; *Continental Grain Co. v. Dant & Russell, Inc.,* 118 F.2d 967 (9th Cir. 1941); see also, *China Union Lines v. Steamship Co. of 1949, Inc.,* 136 F.Supp. 597 (S.D.N.Y. 1955)). Cowden could and did present all of its objections to arbitration in the proceedings in San Francisco, both in the District Court there and in the Ninth Circuit; it plainly had an adequate remedy. As the District Court in Kentucky concisely stated (R. 100)

> "There is a case pending which is the proper forum for the determination of whether or not the items claimed by the plaintiff here are subject to arbitration under the terms of the contract."

There is no basis for a writ to review postponement of ruling on the motion for summary judgment

An order denying a motion for summary judgment is not even an appealable order. *Switzerland Cheese Ass'n, Inc. v. E. Horne's Market, Inc.,* 385 U.S. 23 (1966). *A fortiori,* postponement of a ruling on such a motion is not appealable. A court has a wide discretion in handling its own calendar; to hold otherwise would undermine the strong federal policy against piecemeal appeals. See 385 U.S. at 24-5.*

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*Neither *Landis v. North American Co.,* 299 U.S. 248 (1936), nor *Mach-Tronics, Inc. v. Zirpoli,* 316 F.2d 820 (9th Cir. 1963), cited by petitioner, is in point. In *Mach-Tronics* the Court of Appeals corrected a

Incredulously, Cowden asks this Court to undertake the task of a trial court and "render a final decree on the merits" and to do so by way of summary judgment (Pet. pp. 18-22), although no court below has yet purported to rule on the merits!

In this connection Cowden repeatedly asserts, as if they were facts, what are merely contentions; e.g., that Koratron's patents are "invalid" (Pet. 3), that Cowden produces garments "under a system different from" Koratron's (Pet. 3), that Koratron has violated the antitrust laws (Pet. 5) and the like. Yet all these assertions involve questions of fact yet to be tried. To give but one example, Cowden states (Pet. 5) that Koratron's patent licenses to garment makers "require Cowden to purchase unpatented materials for the manufacture of garments. . . ." That is simply not so and is not made true by the vociferousness and repetition of the assertion. The license contains no such requirement (R. 33-47), and an exhibit to Cowden's own Amended Complaint is a letter from Koratron to Cowden of February 3, 1967 showing that there was no such requirement (R. 48). If Cowden has any evidence looking the other way, it would but create a conflict, not resolvable on summary judgment. Other assertions by Cowden of antitrust violation rest on interpretations of the license which Cowden would impose on the license by torture and which Koratron disavows; the correct interpretation awaits trial.

Petitioner is asking this Court to use its certiorari jurisdiction to do what it has held no court of appeals may do under its appellate jurisdiction, viz., to decide a case on the merits where the facts have not been developed in the trial court. *Fountain v. Filson*, 336 U.S. 681 (1949). The cases cited by Cowden (Pet. p. 19) are not to the contrary. *Hurwitz v. Directors Guild of America*,

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virtual abdication of federal jurisdiction in favor of state court litigation. What was held to be an abuse of discretion in *Landis* was a stay pending trial and final review by the Supreme Court of a "test" case between different parties entirely.

Inc., 364 F.2d 67 (2nd Cir.), *cert. denied*, 385 U.S. 971 (1966), was a case where the plaintiffs were entitled to the relief asked on the face of the pleadings. In *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*, 392 F.2d 706 (5th Cir. 1968), the parties agreed that the facts were undisputed, both moving for summary judgment.

Cowden's charges parrot those made in a number of other cases to which Koratron is a party and other garment makers are its adversary. Some were commenced in the Northern District of California, others have been sent there under the new 28 U.S.C. § 1407 by the Panel on Multidistrict Litigation, *In Re Multidistrict Patent and Antitrust Litigation Involving Koratron*, 302 F. Supp. 239 (1969), and others have been transferred there under 28 U.S.C. § 1404(a) (see fn 2, 302 F.Supp. 239, 241). All these cases are now proceeding in extensive consolidated discovery and deposition taking in which the evidence pertinent to the various charges is being developed. In due course they will be tried, and the issues will be presented in an orderly way. Cowden's case belongs in that group. Thus far the Panel on Multidistrict Litigation has stayed its hand from sending this case to join the others solely because it was on appeal, and Cowden resists the transfer now on the excuse that it is seeking certiorari.

CONCLUSION

It is apparent that Cowden's purpose is to delay as long as possible the orderly disposition of its dispute with Koratron. We respectfully submit that the petition lacks any shred of merit and should be denied.

Dated: San Francisco, California, May 22, 1970.

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Attorney for Respondents.